

# Exhibit E

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**EXPERT REPORT OF DAVID FRANKLYN REGARDING LEVEL OF EMERSON  
QUIET KOOL AWARENESS AND CONFUSION BETWEEN EMERSON RADIO AND  
EMERSON QUIET KOOL**

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PREPARED BY:  
David Franklyn  
328 Midvale Avenue  
San Mateo, CA, 94403

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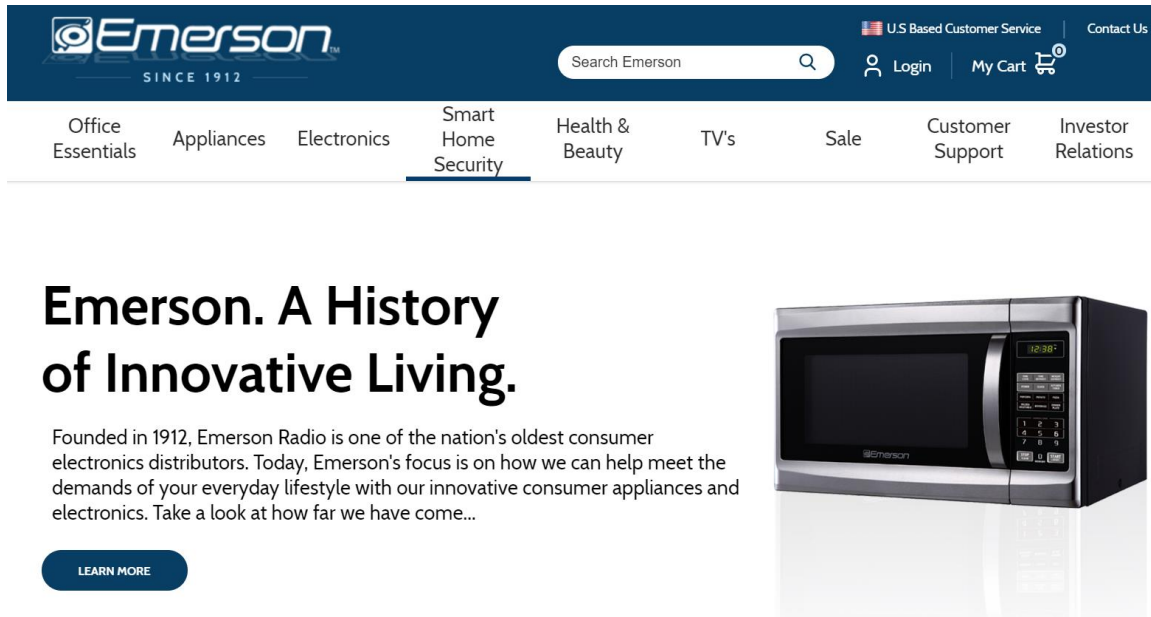

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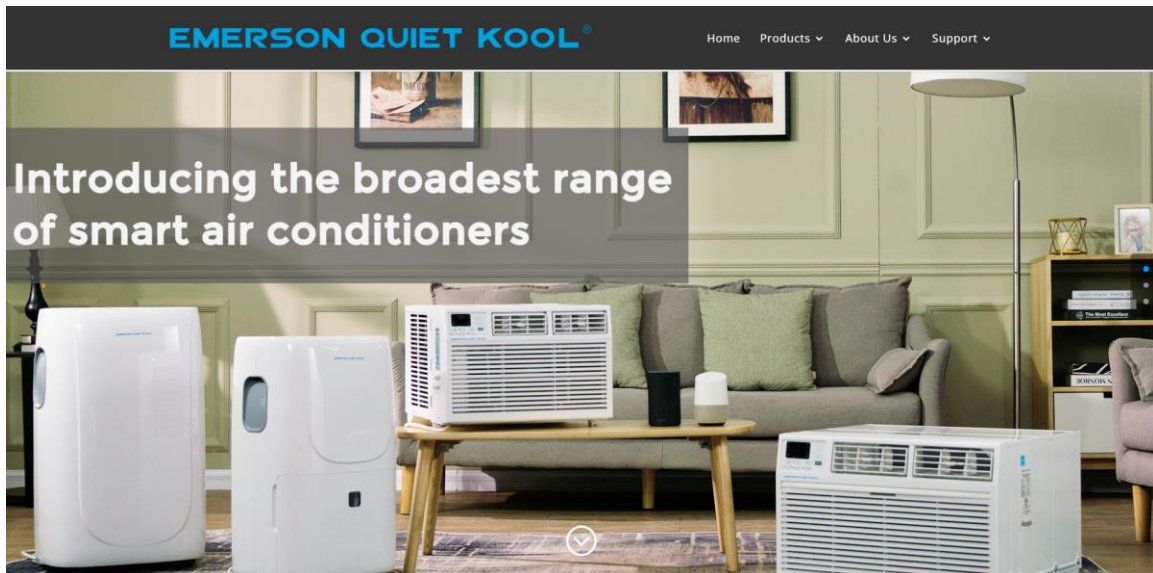
## ***BACKGROUND AND PURPOSE***

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Founded in 1912, Emerson Radio has a long history of providing consumer electronics and home appliances under the mark EMERSON:



In May 2017, Emerson Radio became aware of a new line of air conditioners and dehumidifiers selling under the EMERSON QUIET KOOL brand.



I have been retained by Emerson Radio to assess the level of awareness that the EMERSON QUIET KOOL brand has within an interested universe of consumers.

I have also been retained by Emerson Radio to assess the level of confusion that exists between Emerson Radio's EMERSON mark and the EMERSON QUIET KOOL mark among an interested universe of consumers.

Based on the consumer research outlined within this report, I find that:

1. There is little to no consumers awareness of EMERSON QUIET KOOL as a standalone brand of air conditioners or dehumidifiers;
2. Of those consumers who have heard of EMERSON QUIET KOOL brand products, the overwhelming majority believe they come from the same source as Emerson Radio's products; and
3. A significant portion of the interested universe who encounters these brands confuses the relationship between EMERSON and EMERSON QUIET KOOL.

This finding is also supported by substantial evidence of actual confusion across numerous individuals and entities between Emerson Radio's EMERSON brand and EMERSON QUIET KOOL.

### **STUDY AUTHORSHIP AND QUALIFICATIONS**

These studies were designed, supervised, and implemented under my supervision.

I am currently a professor of Law and Business at Golden Gate University. I hold a dual appointment between the GGU School of Law and Ageno School of Business. Within the GGU School of Law, I teach Intellectual Property Law. Within the Ageno School of Business, I teach a variety of marketing and survey design classes. I am also the Director of the McCarthy Institute, and editor-in-chief and coauthor of McCarthy's Desk Encyclopedia of Intellectual Property Law.

Formerly, between 2000 and 2018, I was a professor of Law and Executive Director of the McCarthy Institute for Intellectual Property and Technology Law at USF and Director of the Center for the Empirical Study of Trademark Law (CEST).

I have consulted and/or qualified as an expert witness on behalf of clients in numerous cases involving consumer perception and behavior issues and related damages issues, including in matters in the United States (federal and various state courts), Asia, the European Union, the Middle East and South America.

I have personally designed and analyzed over 50 studies relating to trademark litigation for federal and district courts, the USPTO, and domestic and international arbitration hearings. Additionally, I have designed and analyzed over 30 academic surveys related to consumer perceptions in support of numerous articles and speaking engagements, including giving seminars on empirical survey design for trademark judges in the European Union Intellectual Property Office. At the Ageno School of Business, I teach a course in Consumer Behavior and Brand Tracking.

In addition to my survey research experience, I hold a J.D. from University of Michigan Law School. Additional biographical material, including lists of testimony and publications, is provided in Appendix A.

I am being compensated in connection with my engagement at my standard rate of \$675 per hour, plus reimbursement of travel expenses. My compensation is not dependent upon the outcome of this proceeding.

Signed and sworn this 29th day of July, 2020 under penalty of perjury.

A handwritten signature in cursive script, reading "David J. Franklyn", followed by a horizontal flourish.

David J. Franklyn, July 2020

## **STUDY OVERVIEW**

To assess the objectives as outlined above, I conducted two discrete surveys.

### **a. SURVEY 1**

In order to evaluate the awareness levels of the EMERSON QUIET KOOL brand, a survey was conducted among an interested universe of n=650 existing or prospective consumers of air conditioners and/or dehumidifiers.

After successfully completing the screening portion of the survey, consumer respondents were asked to name all brands of air conditioners and/or dehumidifiers they could think of. This established a baseline level of unaided awareness for the Emerson Quiet Kool brand.

Respondents were then shown a list of several brands (in revolving order) that offer air conditioners / dehumidifiers. Within this list, the respondents were shown one of the three brands of interest listed below:

- Cell A – Respondents were shown Emerson Quiet Kool among the listed brands
- Cell B – Respondents were shown Emerson among the listed brands
- Cell C – Respondents were shown Quiet Kool among the listed brands

To control for spurious responses, two “dummy” brands also were included: “Aeroneer” and “Cool Dynamic.” Any respondents selecting that they were aware of either of these “dummy” brands were terminated, and their responses were not analyzed.

Respondents who indicated that they were familiar with the target brand in each cell (e.g. Emerson Quiet Kool in Cell A) were then asked to indicate whether the brand offered products other than air conditioners or dehumidifiers.



Then, respondents who indicated that they believed that the brand made products other than air conditioners or dehumidifiers were asked two follow up questions. First, those respondents were asked, unaided, to list what, if any, other products besides air conditioners or dehumidifiers they believed that brand made. Second, they were asked to pick from a list of other products typically offered from consumer electronics and home appliances makers which, if any, they believed the air conditioner or dehumidifier brand also made.

## **b. SURVEY 2**

In Survey 2, I used a modified lineup survey methodology to assess the level of confusion that exists between EMERSON and EMERSON QUIET KOOL products among an interested universe of n=1,200 existing or prospective purchasers of consumer electronics and home appliances.<sup>1</sup>

After completing the screening portion of the survey, consumer respondents were shown screenshots of six products, taken from leading retailer websites where one or more of the parties' products are sold. Within test cells, among these products were an EMERSON microwave and an EMERSON QUIET KOOL air conditioner. In control cells, respondents saw a microwave from an alternative brand to establish baseline levels of confusion.

After reviewing all products, respondents were asked to indicate if the products were all from separate companies, or if two or more products were from the same company or companies that were affiliated or connected in any way. Those indicating any products had a relationship were then asked to identify which products and provide a rationale for their decision.

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<sup>1</sup> See § 32:177. Survey Formats—Product “line-up” survey methods, 6 McCarthy on Trademarks and Unfair Competition §§ 174.50; 177” (5th ed.). See also *AHP Subsidiary Holding Co. v. Stuart Hale Co.*, 1 F.3d 611, 618 (7th Cir. 1993); *Gross v. Bare Escentuals Beauty, Inc.*, 641 F. Supp. 2d 175, 190–91 (S.D.N.Y. 2008); *Rex Real Estate I, L.P. v. Rex Real Estate Exch., Inc.*, No. A-19-CV-696-RP, 2020 WL 710198, at \*3 (W.D. Tex. Feb. 12, 2020).

Respondents were then further asked if any additional products besides those already identified were from the same company or companies that were affiliated or connected in any way until respondents indicated that the remaining products had no relationship.

### **SUMMARY OF KEY FINDINGS**

Within Survey 1, which was conducted to assess the level of consumer awareness of the EMERSON QUIET KOOL brand, I found the following.

- I. As a brand of air conditioners or dehumidifiers, EMERSON QUIET KOOL has no unaided brand recognition among an interested universe of consumers.
- II. EMERSON is the dominant portion of the EMERSON QUIET KOOL brand.
- III. There is no consumer awareness of EMERSON QUIET KOOL as a standalone brand apart from its mistaken affiliation with Emerson Radio's brand.

Within Survey 2, which was conducted to assess levels of confusion between the EMERSON and EMERSON QUIET KOOL brands, I found the following.

- IV. A statistically significant portion of consumers (i.e. 20%) exposed to both EMERSON QUIET KOOL and EMERSON products indicate confusion as to source, sponsorship, or affiliation between the brands.
- V. My survey findings are supported by documented actual confusion.

## **SURVEY 1 METHODOLOGY**

### **Experimental Design**

After passing screening criteria and qualifying into the survey, respondents were asked to indicate brands of air conditioners and/or dehumidifiers that come to mind.

When you think about air conditioners or dehumidifiers, which brands come to mind?  
Please list each brand in a separate text box, and list all brands of air conditioners or dehumidifiers that you can think of.

Brand 1

Brand 2

Brand 3

Brand 4

Brand 5

Brand 6

Brand 7

Brand 8

Brand 9

Brand 10

Brand 11

Brand 12

Continue »

Consumers were provided with 10 open ended text boxes, and were required to name at least one brand.

Next, consumers were shown a list of air conditioner and dehumidifier brands currently on the market and were asked which brands they had heard of. Response options were randomized.

Still thinking about air conditioners and dehumidifiers, which of the following brands have you heard of?  
Please select all brands you have heard of.

- ☐ Cool Dynamic
- ☐ Friedrich
- ☐ Frigidaire
- ☐ MIDEA
- ☐ Emerson Quiet Kool
- ☐ Whirlpool
- ☐ LG
- ☐ GE
- ☐ TCL
- ☐ Toshiba
- ☐ Haier
- ☐ Aeroneer
- ☐ I've never heard of any of these brands

Continue »

In Cell A, consumers were shown Emerson Quiet Kool, as shown in the question above.

In Cell B, consumers were shown Emerson instead of Emerson Quiet Kool.

In Cell C, consumers were shown Quiet Kool instead of Emerson Quiet Kool.

All other brands were identical across all cells. To control for false association, two fictitious brands were included in this list (“Aeroneer” and “Cool Dynamic”).

Respondents who selected either of these brands were terminated and their responses were not analyzed.

Next, consumers who indicated that they had previously heard of the brands of interest (Emerson Quiet Kool in Cell A, Emerson in Cell B, or Quiet Kool in Cell C) were asked whether or not they believed that company also made other products in addition to air conditioners and dehumidifiers. Response options 1 (“Yes”) and 2 (“No”) were randomized. Response option 3 (“I don’t know”) was always anchored at the bottom of the list.

In the prior question, you mentioned that you are aware of the Emerson Quiet Kool brand of air conditioners or dehumidifiers.

Do you think that the company that makes Emerson Quiet Kool air conditioners or dehumidifiers also makes other products?

Select one

- ☐ Yes, the company that makes Emerson Quiet Kool also makes other products in addition to air conditioners or dehumidifiers
- ☐ No, the company that makes Emerson Quiet Kool only makes air conditioners or dehumidifiers
- ☐ I do not know or have no opinion

Continue »

Consumers who indicated that they think that the brand also makes other products in addition to air conditioners or dehumidifiers were then asked what other products the brand made.

In the prior question, you said that you believe that Emerson Quiet Kool also makes other products in addition to air conditioners or dehumidifiers.

What other products do you believe that Emerson Quiet Kool makes?

Product 1

Product 2

Product 3

Product 4

Product 5

Product 6

Product 7

Product 8

Product 9

Product 10

Product 11

Product 12

Continue »

Respondents were given twelve text boxes to enter a variety of products and were required to input at least one product.

Finally, respondents were shown a list of products and asked which other products, if any, they believe the brand made.

In a prior question, you said that you believe that Emerson Quiet Kool also makes other products in addition to air conditioners or dehumidifiers.

Which other products, if any, do you believe they make?

Select all that apply

- ☐ Security Cameras
- ☐ Clock Radios
- ☐ Microwaves
- ☐ Televisions
- ☐ Bluetooth Speakers
- ☐ Compact or mini-refrigerators
- ☐ Massagers
- ☐ Wine Coolers
- ☐ Other
- ☐ None of the above

Continue »

Response options were randomized, with the exception of “Other” and “None of the Above”, which remained anchored at the bottom. “None of the above” was exclusive, meaning that respondents could not select that option if they selected any of the products earlier in the list.

### **The Relevant Universe of Interest**

The interested universe of this study was consumers who had purchased an air conditioner or dehumidifier within the past 24 months and/or intended to purchase an air conditioner or dehumidifier in the next 12 months.

Respondents first provided their age.

What is your age?

Please select one.

- ☐ Under 18
- ☐ 18-24
- ☐ 25-34
- ☐ 35-44
- ☐ 45-54
- ☐ 55-64
- ☐ 65+
- ☐ Prefer not to answer

Continue »

Respondents who selected “Under 18” or “Prefer not to answer” were terminated from the survey.

Next, they were asked to provide their gender. Options for “Female” and “Male” were randomized.

What is your gender?

Please select one.

- ☐ Female
- ☐ Male
- ☐ Prefer not to answer

Continue »

Consumers were asked to provide the state where they live. Those selecting “I do not live in the United States” were terminated.

In what state do you live?

Select one... ▼

Continue »

Consumers were then asked a sensitive industry question.

Do you or does anyone in your household work in the following industries?

Please select all that apply.

- ☐ For a company that makes, manufactures, or sells automobiles
- ☐ In advertising
- ☐ For a company that makes, manufactures, or sells memory foam mattresses
- ☐ For a company that makes, manufactures, or sells consumer appliances
- ☐ For a company that makes, manufactures, or sells consumer electronics
- ☐ In market research
- ☐ None of the above

Continue »

Consumers were terminated if they indicated an existing relationship with:

- Advertising
- Market research
- A company that makes, manufactures, or sells consumer electronics
- A company that makes, manufactures, or sells consumer appliances

Consumers were then asked about their purchasing of a variety of electronics/appliances.



Within the past 24 months, which of the following have you purchased, if any, online or from a brick-and-mortar store?

Please select all that apply.

- ☐ A programmable thermostat
- ☐ A Bluetooth speaker
- ☐ A dehumidifier
- ☐ A compact or mini-refrigerator
- ☐ A clock radio
- ☐ A microwave
- ☐ A home security camera
- ☐ A smart doorbell
- ☐ An air conditioner
- ☐ None of the above

Continue »

Next, respondents were asked if they intended to purchase these same products in the next 12 months.

Within the next 12 months, which of the following do you intend to purchase, if any, online or from a brick-and-mortar store?

Please select all that apply.

- ☐ A programmable thermostat
- ☐ A Bluetooth speaker
- ☐ A dehumidifier
- ☐ A compact or mini-refrigerator
- ☐ A clock radio
- ☐ A microwave
- ☐ A home security camera
- ☐ A smart doorbell
- ☐ An air conditioner
- ☐ None of the above

Continue »

Consumers who have not purchased an air conditioner or dehumidifier within the past 24 months and did not intend to purchase an air conditioner or dehumidifier in the next 12 months were terminated.

### **Sampling Plan**

The sampling plan involved a random selection of consumers who are part of an online panel.

Online surveys are well-accepted in the field of market research and are the most common method of getting insight from consumers. Numerous businesses and other organizations use online surveys to get quantitative feedback from consumers and online surveys have been accepted in evidence in numerous U.S. District Court cases.<sup>2</sup>

The sample of panelists used in the survey was provided by Dynata, a leading supplier of online sample for surveys. Dynata has a large and diverse panel consisting of millions of Americans and is highly regarded as a reputable source of respondents for online surveys within the field of market research.<sup>3</sup> Dynata is also consistently recognized as one of the most innovative suppliers in market research.<sup>4</sup> Dynata utilizes appropriate industry procedures for ensuring the integrity and quality of its panels. Quality and authentication of their panelists are maintained on an ongoing basis through such procedures as digital fingerprinting and matching against third-party databases, among others.

Dynata also ensures data integrity through their continued review of their panelists' behavior on their own and through the assistance of their clients, by employing the following tactics to flag panelists who compromise the quality of their panels:

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<sup>2</sup> Diamond, S. S., & Swann, J. B. (2012). Trademark and deceptive advertising surveys: Law, science, and design. Chicago: American Bar Association, Section of Intellectual Property Law, Chapter 1.

<sup>3</sup> <http://info.dynata.com/rs/105-ZDT-791/images/Dynata-Panel-Book-2020.pdf>.

<sup>4</sup> <https://www.flipsnack.com/GRITarchive/2020-grit-business-innovation.html> p.125.

- Timestamps to flag respondents who take surveys too quickly, indicating they are not paying sufficient attention
- Identifying those who consistently tick items straight down or across grid-format questions, indicating a respondent is clicking without considering each item
- Quality control questions to identify panelists' inattention
- Real-time database analyses to stop fraudulent respondents

Invitations were sent to panelists, and the purpose of the survey was withheld from respondents. Without knowing the purpose of the survey, respondents needed to meet the screening criteria to qualify for the survey. In doing so, they confirmed that they qualified to participate in the survey using the aforementioned screening criteria.

### **Double-Blind Interviewing**

It is important to point out that the study was administered under “double-blind” conditions. Respondents were uninformed as to the purpose and sponsorship of the study. The survey is also, by definition, “blind” in that there is no person administering the questions that could know the purpose or sponsorship of the survey and can do anything to influence the results.<sup>5</sup>

### **Interviewing Procedures**

The online survey questionnaire was constructed, programmed, and hosted through FocusVision, a leading survey response collection platform. The FocusVision platform conducts over 30,000 studies annually.<sup>6</sup>

### **Interviewing Period**

Interviewing was conducted from May 15<sup>th</sup> through May 31<sup>st</sup>, 2020.

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<sup>5</sup> Diamond, S. S., & Swann, J. B. (2012). Trademark and deceptive advertising surveys: Law, science, and design. Chicago: American Bar Association, Section of Intellectual Property Law, p. 181.

<sup>6</sup> <https://www.focusvision.com/products/survey-decipher/>.

### **Quality Control**

Several quality control metrics were employed to ensure the validity of consumer responses.

First, respondents were first provided with a detailed list of instructions and were asked to agree to these instructions in order to participate in the survey.

Thank you for your willingness to participate in our study. This is a brief study that should take no more than 10 minutes of your time. The responses you give to our questions are very important to us. If you don't know an answer to a question or if you don't have an opinion, please indicate this in your response. Do not guess. Your answers will only be used in the aggregate and your personal information will be kept confidential. The results of this study will not be used to try to sell you anything.

Before continuing with this survey, please carefully read these instructions:

- Please take this survey in one session without interruption.
- While taking this survey, please do not at any time open any other windows or tabs on this computer or device or any other computer or device.
- Please keep your browser maximized for the entire survey.
- Please do not view any other websites or electronic or written material while taking this survey.
- Please do not consult or talk with any person while taking this survey.
- You will not be able to go back to previous screens to change your answers.
- If you normally wear eyeglasses or contact lenses when viewing a computer screen, please wear them for the survey.

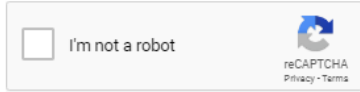
Select one

- ☐ I have read the above instructions, I understand them, and I will adhere to them.
- ☐ I do not understand the above instructions, or I don't wish to agree to them.

Continue »

Respondents who indicated that they did not understand or agree to the instructions were terminated from the survey.

Next, respondents were required to complete a CAPTCHA. CAPTCHA is widely used in online surveys within the world of market research, in order to eliminate computer programs from taking the survey.



Continue »

Third, respondents were required to complete a quality assurance question, and were required to enter “west” in the box directly below the “other” option. Respondents who clicked any of the first five options were immediately terminated.

For quality assurance, please type the word "west" in the blank next to the "Other" box below and then click to continue.

- ☐ Strongly agree
- ☐ Agree
- ☐ Neutral
- ☐ Disagree
- ☐ Strongly disagree
- ☐ Other

Continue »

This ensures that respondents are actively paying attention to the survey questions.

Finally, the survey was restricted from being taken on mobile phones or tablets to ensure clear viewing of the stimuli.

## **SURVEY 2 METHODOLOGY**

### **Experimental Design**

After passing screening criteria and qualifying into the survey, respondents were randomly assigned to one of six cells.

- Cell A (n=200) – Home Depot Test Cell
- Cell B (n=200) – Home Depot Control Cell
- Cell C (n=200) – QVC Test Cell
- Cell D (n=200) – QVC Control Cell
- Cell E (n=200) – Amazon Test Cell
- Cell F (n=200) – Amazon Control Cell

Consumers were then asked to review six images of items currently available for purchase, as if they were considering the purchase of these items.

A 60-second wait was required before consumers were able to continue, and consumers navigated between images using the Red buttons.

The following page shows an example of how the EMERSON branded Microwave looked.

Below are six images of consumer electronics/appliances currently available for purchase. Please review these images as if you were considering the purchase of these items. For each item, please review for a minimum of 10 seconds. After 60 seconds, you will be able to continue.

Please click on Next button to see next image.



2/6

Are you able to see all six images clearly?

☐ Yes

☐ No

In order to mask the purpose of the study, the EMERSON branded microwave and EMERSON QUIET KOOL branded air conditioner were shown alongside four other products available for purchase on that website.

Six items were presented in random order. Example images from QVC are shown on the next page.

Microwave (Test Cell Only)

Emerson 0.9 Cu. Ft. 900W Compact Countertop Microwave Oven

★★★★★ 4.0 (1) [Read Reviews](#)



Air Conditioner (Test and Control Cells)

Emerson Quiet Kool 8,000 BTU Window Air Conditioner w/ Remote

★★★★★ 5.0 (1) [Read Reviews](#)





### Thermostat (Test and Control Cells)

#### Honeywell Wi-Fi Smart Color 7-Day Thermostat

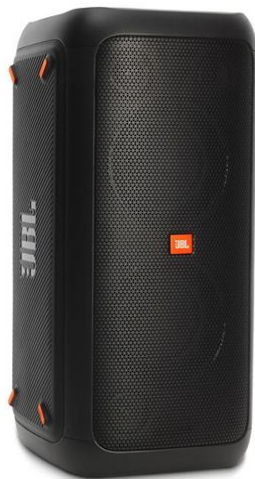
★★★★★ 5.0 (1) [Read Reviews](#)



### Bluetooth Speaker (Test and Control Cells)

#### JBL PartyBox 200 Bluetooth Speaker

★★★★★ 4.8 (24) [Read Reviews](#)



### Dehumidifier (Test and Control Cells)

PureGuardian DH201WCA Small Space Dehumidifier, 0.33 Gallon

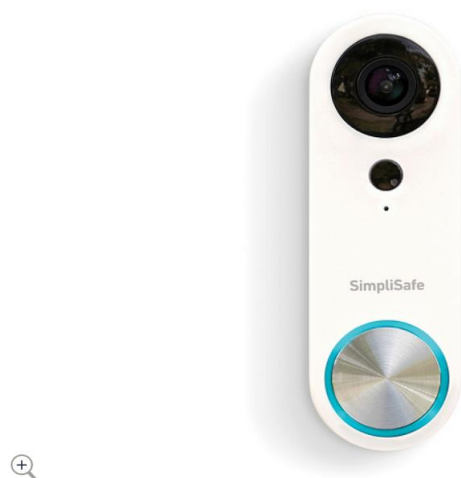
★★★★★ (0) [Write a review](#)



### Video Doorbell (Test and Control Cells)

SimpliSafe Video Doorbell Pro

★★★★★ (0) [Read Reviews](#)



As mentioned above, this study utilized a test and control design to account for “noise” within the data. The control was used to establish baseline levels of association for the

air conditioner and microwave, even when a non-Emerson branded microwave is used. The control image for the QVC product is shown below:

Microwave (Control Cell Only)

Magic Chef 0.7 Cubic Ft 700 Watt Microwave

★★★★★ 5.0 (1) [Read Reviews](#)



-

All images were retrieved via the respective websites ([www.homedepot.com](http://www.homedepot.com), [www.qvc.com](http://www.qvc.com), [www.amazon.com](http://www.amazon.com)) on or around January 31<sup>st</sup>, 2020. These retailers all sell both EMERSON and EMERSON QUIET KOOL products on their websites and in proximity to one another. In selecting product images for EMERSON and EMERSON QUIET KOOL products, “Emerson” was entered into the search bar for each website and available products were selected that were in proximity to the EMERSON QUIET KOOL air conditioner. In selecting additional “buffer images”, a variety of non-EMERSON products that were available on each website within the consumer appliance/electronics categories were selected.<sup>7</sup>

Importantly, while the images are scaled down to fit on the page of this report, responsive web design was used to maximize the size of images on respondent browsers.

<sup>7</sup> Jerre B. Swann & R. Charles Henn Jr., *Likelihood of Confusion Surveys: The Ever-Constant Eveready Format; the Ever-Evolving Squirt Format*, 109 Trademark Rep. 671, 675–76 (2019).

Furthermore, respondents had the ability to zoom in or out using the standard tools available on their browser.

Respondents were first asked if they could clearly see all six images. Those selecting “No” were terminated.

Next, respondents were shown the same product images and were asked about the relationship between the items shown.

Below are the same set of product images.  
Please click on Next button to see next image.



Do you think that each of these products is from a separate company, or do you think that two or more are from the same company or are affiliated or connected in any way? If you don't know, please feel free to say so.

- ☐ I believe each product is from a separate company
- ☐ I believe that two or more products are from the same company or are affiliated/connected
- ☐ I do not know or have no opinion

For consumers who said “I believe each product is from a separate company” or “I do not know or have no opinion”, the survey ended.

Consumers who indicated that they believed two or more products are from the same company or are affiliated/connected were asked to select the products they believed are from the same company or are affiliated or connected.

Which products do you believe are from the same company or are affiliated or connected?

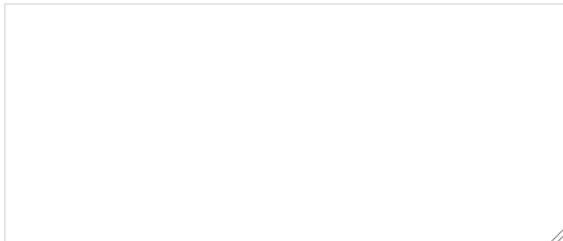
- ☐ Air Conditioner
- ☐ Microwave
- ☐ Thermostat
- ☐ Dehumidifer
- ☐ Security Camera
- ☐ Speaker

Consumers were required to select only two options from the list.

After selecting their options, consumers were asked “Why do you say that?”

Why do you say that?

Be specific



After providing a rationale, consumers were asked if they believed any additional products shown in the images were from the same company or are affiliated or connected.

Your responses have been recorded.

Besides the products you just mentioned, do you think that any additional products shown in the images are from the same company or are affiliated or connected in anyway?

Please select one.

- ☐ No, I believe that all remaining products are from separate companies
- ☐ Yes, I believe that there are additional products that are from the same company or are affiliated/connected
- ☐ I do not know or have no opinion

Those selecting “Yes” were shown the same list of products, asked to select two, and provide a rationale.

Those selecting “No” or “I do not know” had completed the survey.

### **The Relevant Universe of Interest**

The interested universe of this study was consumers who had purchased electronics or appliances within the past 24 months and/or intended to purchase electronics or appliances in the next 12 months.

Respondents first provided their age.

What is your age?

Please select one.

- ☐ Under 18
- ☐ 18-24
- ☐ 25-34
- ☐ 35-44
- ☐ 45-54
- ☐ 55-64
- ☐ 65+
- ☐ Prefer not to answer

Continue »

Respondents who selected “Under 18” or “Prefer not to answer” were terminated from the survey.

Next, they were asked to provide their gender. Options for “Female” and “Male” were randomized.

What is your gender?

Please select one.

☐ Female

☐ Male

☐ Prefer not to answer

Continue »

Consumers were asked to provide the state where they live. Those selecting “I do not live in the United States” were terminated.

In what state do you live?

Select one... ▼

Continue »

Consumers were then asked a sensitive industry question.

Do you or does anyone in your household work in the following industries?

Please select all that apply.

☐ For a company that makes, manufactures, or sells automobiles

☐ In advertising

☐ For a company that makes, manufactures, or sells memory foam mattresses

☐ For a company that makes, manufactures, or sells consumer appliances

☐ For a company that makes, manufactures, or sells consumer electronics

☐ In market research

☐ None of the above

Continue »

Consumers were terminated if they indicated an existing relationship with:

- Advertising
- Market research
- A company that makes, manufactures, or sells consumer electronics
- A company that makes, manufactures, or sells consumer appliances

Consumers were then asked about their purchasing of a variety of electronics/appliances.

Within the past 24 months, which of the following have you purchased, if any, online or from a brick-and-mortar store?

Please select all that apply.

- ☐ A programmable thermostat
- ☐ A Bluetooth speaker
- ☐ A dehumidifier
- ☐ A compact or mini-refrigerator
- ☐ A clock radio
- ☐ A microwave
- ☐ A home security camera
- ☐ A smart doorbell
- ☐ An air conditioner
- ☐ None of the above

Continue »

Next, respondents were asked if they intended to purchase these same products in the next 12 months.



Within the next 12 months, which of the following do you intend to purchase, if any, online or from a brick-and-mortar store?

Please select all that apply.

- ☐ A programmable thermostat
- ☐ A Bluetooth speaker
- ☐ A dehumidifier
- ☐ A compact or mini-refrigerator
- ☐ A clock radio
- ☐ A microwave
- ☐ A home security camera
- ☐ A smart doorbell
- ☐ An air conditioner
- ☐ None of the above

Continue »

Consumers who had not purchased any of these products within the past 24 months and did not intend to purchase any of these products in the next 12 months were terminated.

### **Sampling Plan, Double-Blind Interviewing, and Interviewing Procedures**

In keeping with best practices, an identical Sampling Plan, Double-Blind Interviewing technique, and Interviewing Procedures were used as described in the Sampling Plan, Double-Blind Interviewing, and Interviewing Procedures for Survey 1 (*see* above at page 17).

### **Interviewing Period**

Interviewing was conducted from February 7<sup>th</sup> through February 9<sup>th</sup>, 2020.

### **Quality Control**

Several quality control metrics were employed to ensure the validity of consumer responses.

First, respondents were first provided with a detailed list of instructions and were asked to agree to these instructions in order to participate in the survey.

Thank you for your willingness to participate in our study. This is a brief study that should take no more than 10 minutes of your time. The responses you give to our questions are very important to us. If you don't know an answer to a question or if you don't have an opinion, please indicate this in your response. Do not guess. Your answers will only be used in the aggregate and your personal information will be kept confidential. The results of this study will not be used to try to sell you anything.

Before continuing with this survey, please carefully read these instructions:

- Please take this survey in one session without interruption.
- While taking this survey, please do not at any time open any other windows or tabs on this computer or device or any other computer or device.
- Please keep your browser maximized for the entire survey.
- Please do not view any other websites or electronic or written material while taking this survey.
- Please do not consult or talk with any person while taking this survey.
- You will not be able to go back to previous screens to change your answers.
- If you normally wear eyeglasses or contact lenses when viewing a computer screen, please wear them for the survey.

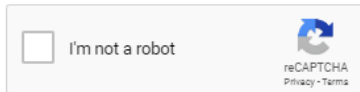
Select one

- ☐ I have read the above instructions, I understand them, and I will adhere to them.
- ☐ I do not understand the above instructions, or I don't wish to agree to them.

Continue »

Respondents who indicated that they did not understand or agree to the instructions were terminated from the survey.

Next, respondents were required to complete a CAPTCHA. CAPTCHA is widely used in online surveys within the world of market research, in order to eliminate computer programs from taking the survey.



Continue »

Third, respondents were required to complete a quality assurance question, and were required to enter “west” in the box directly next to the “other” option. Respondents who clicked any of the first five options were immediately terminated.

For quality assurance, please type the word "west" in the blank next to the "Other" box below and then click to continue.

- ☐ Strongly agree
- ☐ Agree
- ☐ Neutral
- ☐ Disagree
- ☐ Strongly disagree
- ☐ Other

Continue »

This ensures that respondents are actively paying attention to the survey questions.

Finally, the survey was restricted from being taken on mobile phones to ensure clear viewing of the stimuli.

## SURVEY 1 REPORT AND DISCUSSION

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- I. As a brand of air conditioners or dehumidifiers, EMERSON QUIET KOOL has no unaided brand recognition among an interested universe of consumers.

**Table I – Unaided Awareness**

When you think about air conditioners or dehumidifiers, which brands come to mind?

	All Cells  Unaided Awareness  n = 650
GE	22%
Carrier	14%
LG	14%
Frigidaire	12%
Trane	10%
Lennox	10%
Honeywell	8%
Amana	7%
Samsung	6%
Whirlpool	6%
Rheem	4%
Haier	4%
Kenmore	3%
Maytag	2%
American Standard	2%
Bryant	2%
Goodman	2%
Westinghouse	2%
York	2%
DeLonghi	2%
Emerson Quiet Kool	0%

Consumers were first asked to list the brands that come to mind when thinking about air conditioners or dehumidifiers. Brands including GE, Carrier, LG, Frigidaire, Trane, and Lennox were the brands that consumers recalled most often.

Zero respondents mentioned the EMERSON QUIET KOOL brand by its full name or the brand QUIET KOOL. Two respondents, or 0.3% of the interested universe, mentioned “Emerson.” Another person mentioned “Emercon”.

Given this, I conclude that EMERSON QUIET KOOL has not generated any appreciable level of brand awareness for their products among an interested universe of consumers.

## **II. EMERSON is the dominant portion of the EMERSON QUIET KOOL brand**

The word “EMERSON” generates significantly higher awareness than the words “QUIET KOOL” alone or even the words “EMERSON QUIET KOOL” together when respondents are shown a list of brands and asked to indicate their awareness. I therefore conclude that EMERSON is the dominant portion of the EMERSON QUIET KOOL mark. As such, the word EMERSON significantly contributes to consumer purchasing interest.

**Table II – Aided Awareness**

Still thinking about air conditioners and dehumidifiers, which of the following brands have you heard of?

	Cell A  Included “Emerson Quiet Kool”  n = 217	Cell B  Included “Emerson”  n = 217	Cell C  Included “Quiet Kool”  n = 216
Whirlpool	76%	77%	70%
GE	75%	74%	70%
LG	73%	66%	65%
Frigidaire	66%	69%	69%
Toshiba	44%	41%	43%
<b>Emerson</b>	-	<b>40%</b>	-
Haier	37%	43%	41%
<b>Emerson Quiet Kool</b>	<b>22%</b>	-	-
Friedrich	20%	18%	15%
<b>Quiet Kool</b>	-	-	<b>11%</b>
TCL	6%	8%	6%
MIDEA	3%	3%	5%
I've never heard of any of these brands	2%	3%	3%

As noted in the methodology, after answering the unaided awareness question, consumers were randomly assigned to one of three cells where they either saw “Emerson Quiet Kool”, “Emerson”, or “Quiet Kool” among a list of brands.

First, there was strong directional consistency across cells for the other brands tested, with Whirlpool, GE, LE, and Frigidaire being the primary brands consumers are aware of, and Toshiba, Haier, and Friedrich being secondary brands consumers are aware of.

Twenty-two percent of the interested universe indicated that they were aware of the EMERSON QUIET KOOL brand. This does not meet the established benchmarks for trademark fame, and highlights that the majority of consumers do not recall the EMERSON QUIET KOOL brand when shown it in a list of other brands.

Secondly, EMERSON QUIET KOOL's awareness is significantly lower than EMERSON by comparison. Namely, 40% of consumers indicated awareness of the Emerson brand of air conditioners and dehumidifiers compared to only 22% awareness of EMERSON QUIET KOOL despite the fact that no air conditioners or dehumidifiers are currently sold under the EMERSON brand. Likewise, the QUIET KOOL brand when tested as a standalone brand generates 11% awareness. This is half of the awareness that EMERSON QUIET KOOL generates and approximately one-fourth of the awareness that Emerson alone generates.

Based on this, I conclude that the EMERSON QUIET KOOL branding has generated awareness among only a small fraction of the market. I also conclude given the lower comparative awareness of "QUIET KOOL" and "EMERSON QUIET KOOL" compared to "EMERSON," that "EMERSON" clearly is the more dominant feature of the "EMERSON QUIET KOOL" mark, likely due to the brand equity that Emerson Radio has built over the past century as a leader in consumer electronics and home appliances.

**III. There is no consumer awareness of EMERSON QUIET KOOL as a standalone brand apart from its mistaken affiliation with Emerson Radio's brand.**

When asked whether the EMERSON QUIET KOOL brand offers products in addition to air conditioners and dehumidifiers, the overwhelming majority of consumers mistakenly believe that it does. And when specifically asked what other products EMERSON QUIET KOOL makes, an overwhelming majority of respondents selected products that are or were recently sold under Emerson Radio's brand such as clock radios, microwaves, televisions, and compact or mini refrigerators. These results demonstrate that there is no consumer awareness of EMERSON QUIET KOOL as a standalone brand, apart from its mistaken affiliation with the Emerson Radio brand. Therefore, it is likely that the majority of consumers who identify EMERSON QUIET KOOL as a known brand did so from their awareness of the Emerson Radio brand in general.

After indicating their awareness of the brands, consumers aware of the brands of interest (e.g., Emerson Quiet Kool in Cell A, etc.) were asked a follow-up question to better understand whether the air conditioners and dehumidifiers were part of a larger offering of products.

**Table III – Product Offering**

In the prior question, you mentioned that you are aware of the [BRAND] brand of air conditioners or dehumidifiers.

Do you think that the company that makes [BRAND] air conditioners or dehumidifiers also makes other products?

	Cell A  Product Offering for Emerson Quiet Kool  n = 48	Cell B  Product Offering for Emerson  n = 86	Cell C  Product Offering for Quiet Kool  n = 24
No, the company that makes [BRAND] only makes air conditioners or dehumidifiers	2%	0%	8%
Yes, the company that makes [BRAND] also makes other products in addition to air conditioners or dehumidifiers	63%	81%	38%
I do not know or have no opinion	35%	19%	54%

When focusing on EMERSON QUIET KOOL, the majority of respondents (63%) aware of the brand believe that the company makes products in addition to air conditioners or dehumidifiers. Another 35% are uncertain. Within this survey only 2% of those aware of EMERSON QUIET KOOL correctly state that the company only makes air conditioners or dehumidifiers.

In terms of the total interested universe, when basing this to the overall population (2% of 22%) this means that only 0.4% of the interested universe accurately understand Emerson Quiet Kool's market proposition.



Further reinforcing this are the overwhelmingly correct responses for the EMERSON brand, where 81% of consumers aware of the brand accurately state that Emerson makes products that are not air conditioners and dehumidifiers.

For QUIET KOOL, most consumers (54%) do not know or prefer not to provide an opinion on QUIET KOOL's extended product offering. However, even in this cell, only a small percentage (8%) believe that the brand only offers air conditioners and dehumidifiers.

Finally, consumers who believed that the company of interest offered products beyond air conditioners and dehumidifiers were asked what other products they offer.

When asked unprompted, a majority of consumers named on their own many of the products commonly associated with EMERSON.

#### **Table IV – Products Offered – Open Ended**

In the prior question, you said that you believe that [BRAND] also makes other products in addition to air conditioners or dehumidifiers. What other products do you believe that [BRAND] makes?

	Cell A  Product Offering for Emerson Quiet Kool  n =30	Cell B  Product Offering for Emerson  n =70	Cell C  Product Offering for Quiet Kool  n =9
Televisions	30%	41%	0%
Radios	23%	23%	0%
Microwaves	17%	9%	0%
Refrigerators	17%	7%	0%
Freezers	10%	1%	0%
DVD Players	7%	4%	0%
Electronics	7%	10%	0%
Stereos	7%	9%	0%

CD Players	3%	1%	0%
Clocks	3%	4%	0%
Coolers	3%	0%	0%
Dehumidifiers	3%	0%	0%
Dishwashers	3%	1%	0%
Fans	3%	9%	0%
Furnaces	3%	1%	0%
Hot Water Heaters	3%	0%	0%
Humidifiers	3%	3%	22%
HVAC	3%	0%	0%
Ovens	3%	3%	0%
Speakers	3%	4%	0%
Thermostats	3%	0%	0%
Toasters	3%	1%	0%
Air Conditioners	0%	3%	11%
Air Purifiers	0%	4%	22%
Appliances	0%	6%	0%
Blenders	0%	3%	0%
Blu-Ray Players	0%	3%	0%
Cassette Players	0%	1%	0%
Climate Tech	0%	1%	0%
Coffee Makers	0%	1%	0%
Dryers	0%	1%	0%
Earbuds	0%	1%	0%
Gas Cans	0%	0%	11%
Heaters	0%	1%	11%
Lights	0%	1%	0%
Motors	0%	3%	0%
Monitors	0%	1%	0%
Power Tools	0%	1%	0%
Tablets	0%	1%	0%
Vacuums	0%	3%	0%
Washing Machines	0%	1%	0%

After providing their open-ended responses, respondents were shown a list of products and asked which, if any, were offered by the company of interest.

**Table V – Products Offered – Close Ended**

In a prior question, you said that you believe that [BRAND] also makes other products in addition to air conditioners or dehumidifiers. Which other products, if any, do you believe they make?

	Cell A  Products Offered for Emerson Quiet Kool  n =30	Cell B  Products Offered for Emerson  n =70	Cell C  Products Offered for Quiet Kool  n =9
Televisions	67%	79%	11%
Clock Radios	63%	63%	33%
Microwaves	57%	66%	22%
Compact or mini-refrigerators	57%	47%	67%
Wine Coolers	23%	29%	56%
Bluetooth Speakers	13%	24%	11%
Massagers	10%	17%	22%
Security Cameras	7%	20%	33%
Other	7%	1%	0%

Both the open-ended and closed-ended data make clear that consumers associate the EMERSON QUIET KOOL brand with EMERSON products. The products that consumers most associate with EMERSON QUIET KOOL brand are televisions, radios, microwaves, and refrigerators, which are products sold or recently sold under the EMERSON brand. Incidentally, these products falsely affiliated with EMERSON QUIET KOOL are the same products that consumers highlight when asked only about EMERSON. And notably, while the base size is very low for QUIET KOOL, which is a function of its extremely low brand awareness, consumers did not associate QUIET KOOL with the same televisions, radios, microwaves, or refrigerators, which demonstrates that it is the inclusion of the word “EMERSON” that is causing this false affiliation.

Given these results, it is likely that consumers who see the EMERSON QUIET KOOL name associate it with Emerson Radio's EMERSON brand.

I therefore find that there is no consumer awareness of the EMERSON QUIET KOOL brand apart from its mistaken affiliation with Emerson Radio's EMERSON brand.

## **SURVEY 2 REPORT AND DISCUSSION**

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### **IV. A statistically significant portion of consumers (i.e. 20%) exposed to both EMERSON QUIET KOOL and EMERSON products indicate confusion as to source, sponsorship, or affiliation between the brands.**

To test confusion among an interested universe of consumers, I utilized a survey where consumers were exposed to a variety of products and asked to indicate if any products had a relationship.

As outlined in the methodology section, there are several retail websites where consumers could see products from both EMERSON and EMERSON QUIET KOOL available for sale. I tested product images from Home Depot, QVC, and Amazon. The results for each of these tests are shown below.

In all cells, consumers saw the EMERSON QUIET KOOL air conditioner.

In the Home Depot test cell, consumers saw an EMERSON brand microwave. In the control cell, consumers saw a Magic Chef brand microwave.

In the QVC test cell, consumers saw an EMERSON brand microwave. In the control cell, consumers saw a Magic Chef brand microwave.

In the Amazon test cell, consumers saw an EMERSON brand microwave. In the control cell, consumers saw a Toshiba brand microwave.

**Table VI – Product Association**

Which products do you believe are from the same company or are affiliated or connected?

	Cell A  Home Depot Images  Test Cell  n = 200	Cell B  Home Depot Images  Control Cell  n = 200	Cell C  QVC Images  Test Cell  n = 200	Cell D  QVC Images  Control Cell  n = 200	Cell E  Amazon Images  Test Cell  n = 200	Cell F  Amazon Images  Control Cell  n = 200
Selected Microwave and Air Conditioner	23%	5%	26%	3%	24%	3%

Across all test cells, the range of association between the EMERSON branded Microwave and the EMERSON QUIET KOOL branded Air Conditioner was between 23% and 26% of the interested universe, showing strong consistency across websites.

For the control cells, there is further consistency, where the “noise” level of association of the EMERSON QUIET KOOL air conditioner was associated with the Magic Chef or Toshiba microwaves by 3 to 5% of the interested universe.

After subtracting noise, the net levels of confusion are:

- Home Depot images – 18% (23% - 5% noise)
- QVC images – 23% (23% - 3% noise)
- Amazon images – 21% (24% - 3% noise)

Across all cells, these results indicate substantial levels of confusion among an interested universe of existing and intended purchasers. Consumers were then asked to provide a rationale for their answer.

**Table VII – Rationale for Association**

Why do you say that?

	Cell A  Home Depot Images  Test Cell  n = 200	Cell B  Home Depot Images  Control Cell  n = 200	Cell C  QVC Images  Test Cell  n = 200	Cell D  QVC Images  Control Cell  n = 200	Cell E  Amazon Images  Test Cell  n = 200	Cell F  Amazon Images  Control Cell  n = 200
% of population mentioning “Emerson”	14%	-	15%	-	15%	-
% of Population mentioning “Brand/company”	4%	-	5%	-	4%	-
Sum of mentions	<b>18%</b>	-	<b>20%</b>	-	<b>19%</b>	-

After reviewing the open-ended responses, the overwhelming majority of respondents mentioned Emerson by name or said the association was because of the brand/company.

Given these results, it is clear that a statistically significant portion of the interested universe is confused as to the relationship between the EMERSON and EMERSON QUIET KOOL brands, after viewing products that are in close proximity on leading online websites.

#### IV. My survey findings are supported by documented actual confusion

These survey findings are corroborated by substantial evidence of actual confusion in the record (*see* Appendix E). After my review of these materials, I found that a substantial amount of confusion exists across a variety of sources, including:

- Numerous and ongoing calls made to EMERSON's customer service departments regarding EMERSON QUIET KOOL products, mistaking the identities between the plaintiff and defendant in this case. This data includes some who were referred to EMERSON by EMERSON QUIET KOOL retailers including Brand Smart and Best Buy.<sup>8</sup>
- Complaints made to the Better Business Bureau of New Jersey about EMERSON QUIET KOOL products by consumers referring to them as EMERSON products which the BBB then mistakenly directed to Emerson Radio, indicating that Emerson Radio's website is [www.emersonquietkool.com](http://www.emersonquietkool.com).<sup>9</sup>
- Purchase orders created by EMERSON QUIET KOOL retailers and distributors referring to EMERSON QUIET KOOL products as EMERSON.<sup>10</sup>
- Confusion by an EMERSON investor regarding EMERSON QUIET KOOL products.<sup>11</sup>
- Product reviews which refer to EMERSON QUIET KOOL products as EMERSON.<sup>12</sup>

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<sup>8</sup> Deposition of Terry Powers, Customer Service Representative at Emerson Radio, December 18, 2019, pages 14-19; Deposition of Aimee Acevado Customer Service Manager, Account and Vendor Compliance Manager, and Imports Coordinator at Emerson Radio, December 18, 2019, pages 14-18; Deposition of Barry Smith, Treasurer and Senior Vice President at Emerson Radio Corporation, December 17, 2019, page 69; ER31538; Emerson Radio's First Supplemental Responses And Objections To Emerson Quiet Kool's First Set Of Interrogatories.

<sup>9</sup> ER23588; ER31495.

<sup>10</sup> HE000106-109, HE00011, HE000103104, HE000102, HE000101, HE000091-100, HE000001-10.

<sup>11</sup> Deposition of Braden Leonard, Hedge Fund Manager at BLM Investment Partners LP, December 3, 2019, pages 29-30; Deposition of Barry Smith, Treasurer and Senior Vice President at Emerson Radio Corporation, December 17, 2019, page 15.

<sup>12</sup> *See* ER22762; ER22765; ER22738; ER22736; ER22745; ER22734; ER22747; ER22752.

- A sales representative from Continental Marketing, Steven Anderson, asked Emerson Radio if Emerson Radio could present its EQK air conditioners, which he had seen in the marketplace, to the retailer Kroger.<sup>13</sup>

In my experience as a survey expert in trademark cases, this volume and variety of actual confusion is rare and reinforces the survey findings that a significant portion of consumers are confused by the relationship between EMERSON and EMERSON QUIET KOOL.

## CONCLUSION

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Based on the extensive consumer research I describe in this report, it is clear that EMERSON QUIET KOOL has not built any appreciable brand equity that has created any differentiated meaning in the mind of the consumer.

When asked to think of brands of air conditioners and dehumidifiers, no respondents mentioned EMERSON QUIET KOOL.

When shown a list of brands, only a small portion identified EMERSON QUIET KOOL as a brand they were aware of, while a significantly higher portion recalled the EMERSON brand, and even fewer recognized QUIET KOOL in isolation.

Even more telling, those who were aware of the EMERSON QUIET KOOL brand believe that the brand offered products beyond air conditioners and dehumidifiers, highlighting all of the EMERSON brand products that have been marketed over the course of Emerson Radio's hundred year commercial history (e.g. televisions, radios, refrigerators, microwaves).

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<sup>13</sup> Deposition of Barry Smith, Treasurer and Senior Vice President at Emerson Radio Corporation, December 17, 2019, pages 42-44.



Based on my studies in this matter, it is my opinion that the dominant commercial impression of the defendants' trademark "EMERSON QUIET KOOL" is "EMERSON". As such, the word EMERSON significantly contributes to consumer purchasing interest. Finally, when exposed to products they could likely encounter on major online retail websites, a statistically significant portion of consumers believe that EMERSON QUIET KOOL products and EMERSON products either come from a single source, or are affiliated or connected, and are therefore confused as to the relationship that exists between the two brands. This demonstrates that the EMERSON QUIET KOOL brand has no differentiated meaning in the mind of consumers apart from its confusion with the Emerson Radio brand. This is only further supported by the significant level of actual confusion that has already occurred as to the relationship between the EMERSON and EMERSON QUIET KOOL brands, among consumers, retailers, reviewers, and investors.

These results and this evidence lead to my ultimate conclusion that there is a substantial risk of consumer confusion between Emerson Radio's EMERSON mark and EMERSON QUIET KOOL.